Supreme Court, U. S.
FILED
NOV 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-297

JOHN J. HORN, COMMISSIONER, DIVISION OF EMPLOYMENT SECURITY, DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY, WILLIAM J. KRISTJEN, MANAGER, CENTRAL NEWARK UNEMPLOYMENT INSURANCE CLAIMS OFFICE OF THE DIVISION OF UNEMPLOYMENT AND DISABILITY INSURANCE OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY, AND JAMES A. WARE, ASSISTANT COMMISSIONER FOR INCOME SECURITY OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY,

Petitioners,

v.

ANNA ROSS, JOYCE NORKETT and CHARLES THOMAS, individually and on behalf of all other persons similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

RICHARD S. SEMEL,
Attorney for Respondents,
47 Essex Street,
Hackensack, New Jersey 07601.
(201) 487-2166

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
1. There is no conflict between the decision of the Circuit Court of Appeals and the cases relied upon by the petitioner	4
2. This case is not ripe for consideration	7
CONCLUSION	7
APPENDIX:	
A—Letter Opinion of Judge Barlow, dated February 5, 1975	1a
B—Transcript of Argument on Motion to Amend Order of Dismissal	6a

Cases Cited

American Construction Co. v. Jacksonville, Tampa and Key West Ry. Co., 148 U. S. 372 (1892)	7
Brotherhood of Locomotive Firemen v. Bangor A.R. Co., 389 U. S. 327 (1967)	7
Christiansburg Garment Co. v. EEOC, 434 U. S. 412 (1978)	4
Clanton v. Allied Chemical Corp., 409 F. Supp. 282 (E.D. Va. 1976)	6
Kahan v. Rosentiel, 424 F. 2d 163 (3d Cir. 1970)	6
Nadeau v. Helgemoe, 581 F. 2d 275 (1st Cir. 1978)	5

PAGE

Statute Cited

42 U.S.C.:

Sec. 503(a) 5

Sec. 503(a)(1) 2

Sec. 503(a)(3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-297

JOHN J. HORN, COMMISSIONER, DIVISION OF EMPLOYMENT SECURITY, DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY, WILLIAM J. KRISTJEN, MANAGER, CENTRAL NEWARK UNEMPLOYMENT INSURANCE CLAIMS OFFICE OF THE DIVISION OF UNEMPLOYMENT AND DISABILITY INSURANCE OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY, AND JAMES A. WARE, ASSISTANT COMMISSIONER FOR INCOME SECURITY OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY,

Petitioners,

v.

ANNA ROSS, JOYCE NORKETT and CHARLES THOMAS, individually and on behalf of all other persons similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Statement of the Case

The Complaint filed on June 4, 1974, alleged that the plaintiffs and the class they represent were denied payment of unemployment compensation benefits when due and an opportunity for a fair hearing, as required by 42 U.S.C. §§503(a)(1) and (3) as the result of the operation of an unwritten policy of the New Jersey Division of Employment Security. Specifically, it was alleged that claimants suspected of, accused of, or indicted for, but not convicted of, receiving unemployment benefits while employed had their applications "pended" for indefinite periods of time. In the case of the original named plaintiffs the periods exceeded 18 months.

In September, 1974, Petitioner promulgated a regulation, Administrative Instruction UIM-451, designed to cure the challenged defect. It required members of the plaintiff class to be provided with pre-determination hearings and to be issued appealable determinations. In November, 1974, the new procedures were applied to the original named plaintiffs, following which Petitioner moved to dismiss the case as moot. The motion was denied for reasons set forth in the trial court's letter opinion of February 5, 1975, a copy of which is included herein as Respondents' Appendix A.

During the next two years, the new regulation was amended, supplemented, and superseded by a second regulation, UIM-490, which was in turn supplemented less than one week before the trial. The forms of notices and determinations used by Petitioner were also revised during this period. The case was tried in January and February, 1977, and a letter opinion filed in May, 1978. In that opinion, the District Court declined to rule on the challenge to the pre-litigation policy:

> "Thus, our only task is to decide whether or not the procedures presently utilized, as we understand them from the testimony and documentary evidence presented at trial, comport with the pertinent federal statutory and constitutional provisions." Letter Opinion of Honorable George H. Barlow, dated May 23, 1978, page 8.

The court went on to determine that the new procedures satisfied the provisions of the above-cited statute. On May 24, 1978, an order was entered dismissing the complaint (Pet. App. D).

Plaintiffs then moved for an order amending the order of dismissal to include a declaration that it was the 1977 New Jersey regulations which the court had found met the statutory and constitutional challenges raised in the complaint, that those regulations could not be revoked or their substantive provisions vitiated by amendment, and awarding costs and counsel fees to the plaintiff class. A portion of the argument on the motion is included in the Petition as Appendix B. The complete transcript is included herein as Respondents' Appendix B. In the course of the argument, counsel for Petitioner acknowledged that the institution of suit had disclosed "substantial defects" in New Jersey's practices and conceded that the litigation did result in "very substantial changes being made" (Resp. App. B, p. 12a). The court too acknowledged the relationship between the suit and the changes.

> "They were changed, as you know, I think specifically, as you suggest, by reason of the suit you brought, or at least that was a contributing factor until they passed statutory and constitutional muster, but I never addressed myself to the impropriety of the original regulation." (Resp. App. B, p. 8a)

Apparently believing that he was foreclosed by his dismissal of the complaint from holding that the plaintiff class had prevailed, Judge Barlow denied the motion (Resp. App. B, p. 9a; Pet. App. C).

In the Third Circuit opinion, Judge Higginbotham has corrected that error, remanding the case to the District Court with instructions to "conduct an inquiry to determine whether the lawsuit was the catalyst for the implementation of all or any of the reform measures." (Pet. App. A, p. 21a).

REASONS FOR DENYING THE WRIT

1. There is no conflict between the decision of the Circuit Court of Appeals and the cases relied upon by the petitioner.

Although the Petition cites several cases and claims that the Third Circuit opinion is inconsistent with those cases, it fails to specify the inconsistency. A reading of the cases cited discloses that the court below followed the cases, to the extent that they are apposite.

Petitioner places principal reliance on the case of *Christiansburg Garment Co.* v. *EEOC,* 434 U. S. 412 (1978). That case is distinguishable and is not in conflict with the Third Circuit opinion. The issue in *Christiansburg* was the award of counsel fees to a successful defendant. Justee Stewart briefly summarized two policy considerations which support the award of fees to prevailing plaintiff, but which are not present in the case of a prevailing defendant. Those considerations are a judicial finding that the plaintiff is the chosen instrument to vindicate "a policy that Congress considered of the highest priority" and that counsel fees are awarded against a violator of federal law.

Petitioner does not suggest that the plaintiff class was not the proper instrument to enforce the policies established by Congress in 42 U.S.C. §503(a), nor does he suggest that New Jersey's original practices were consistent with that law. By implication, the Third Circuit did find that Petitioner violated federal law. Judge Higginbotham characterized the changes as "reforms," and ended his opinion with an express finding that plaintiffs' claims were "substantial or not frivolous." (Pet. App. A, pp. 21a and 22a). The remand specifically directed the District Court to determine the extent to which the new procedures were implemented as a result of the lawsuit. As the opinion specifically states, only to that extent can the plaintiffs be considered "prevailing" parties, and entitled to counsel fees. The remand will provide the kind of inquiry which the cases require.

There is no conflict between the Third Circuit opinion and the opinion in *Nadeau* v. *Helgemoe,* 581 F. 2d 275 (1st Cir. 1978). Judge Higginbotham not only cited *Nadeau,* but followed the procedure suggested by Chief Judge Coffin, who wrote the opinion.

Nadeau held, with respect to issues resolved by a consent decree, that a plaintiff is entitled to attorneys fees when the lawsuit acts as a catalyst in prompting defendants to take action to bring the challenged practices into conformity with federal law. After specifying the guidelines to be applied by the District Court, the *Nadeau* Court remanded. Judge Higginbotham applied exactly the same principles, and directed the District Court to follow the same process. Both courts made use of the "catalyst" language in deciding the cases. Both gave similar weight to chronology as a basis for inferring that the changes were precipitated by the lawsuits, and both recognized that chronology was not, by itself, decisive. One will search in vain for any inconsistency between the two opinions.

The opinion in *Clanton* v. *Allied Chemical Corp.*, 409 F. Supp. 282 (E.D. Va. 1976) does not add anything of significance. The District Court judge there ordered the same type inquiry as was ordered by Judge Higginbotham, for the same reasons.

The citation in the petition of the Third Circuit opinion in *Kahan* v. *Rosentiel,* 424 F.2d 163 (3rd Cir. 1970) is inapposite, but not in conflict with the opinion below. The case was a stockholder's derivative action, in which fees are based upon the creation or preservation by a party of a fund which benefits others. Petitioner quotes parts of two paragraphs from page 167 of the opinion, emphasizing the requirement that the suit be meritorious. The court below specifically found plaintiffs' claims to be meritorious.

In summarizing his arguments, Petitioner first lists various reasons why New Jersey could have reformed its practices and suggests that the court below erred by predicating the award of counsel fees "solely on the presence of a causal relation between the filing of a suit and subsequent concessions by the defendant, * * *." This the Third Circuit did not do. He then suggests the necessity of an inquiry into the merits of plaintiff's claims, which the court did do. Finally, he completely ignores the fact that the Third Circuit concluded its opinion by remanding and directing the District Court to conduct an inquiry to determine the relationship between the lawsuit and the subsequent reforms. That kind of inquiry is what the cited cases require.

2. This case is not ripe for consideration.

Judge Barlow's comments in the course of the argument on the motion to amend the judgment make it clear that contrary to the requirements of the cases, he neglected to determine whether the September, 1974, and subsequent changes in the New Jersey procedures were motivated by the lawsuit filed in June, 1974.

On remand, petitioner may establish a complete lack of connection between the suit and the changes or that there are some special circumstances justifying no award. The award may be so small as to be *de minimis.* Until the required inquiry has been conducted and an award made, the case is not ready for consideration.

This court has repeatedly held that it will not ordinarily entertain interlocutory appeals, notwithstanding that it has the right to do so. The leading case is *American Construction Co.* v. *Jacksonville, Tampa and Key West Ry. Co.,* 148 U.S. 372, 384 (1892), in which the court held that certiorari should be denied where the order below is interlocutory, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case. *Accord, Brotherhood of Locomotive Firemen* v. *Bangor A.R. Co.,* 389 U.S. 327 (1967).

CONCLUSION

For the reasons set forth above, respondents urge that the writ be denied.

Respectfully submitted,

RICHARD S. SEMEL,
Attorney for Respondents.

[APPENDICES FOLLOW]

APPENDIX A

Letter Opinion of Judge Barlow, dated February 5, 1975

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

February 5th, 1975.

Chambers of
GEORGE H. BARLOW
Judge

Federal Building
Trenton, New Jersey 08650

NOT FOR PUBLICATION

Richard S. Semel, Esquire
Bergen County Legal Services
11 Commerce Street
Garfield, New Jersey—07026
(Attorney for Defendant)

Michael S. Bokar, Esquire
Deputy Attorney General
Office of the Attorney General
State House Annex
Trenton, New Jersey—08625
(Attorneys for Defendant)

RE: ANNA ROSS and JOYCE NORKETT, individually and on behalf of all other persons similarly situated v. JOSEPH A. HOFFMAN, Commissioner, Division of Employment Security, Department of Labor and Industry of the State of New Jersey; Civil Action No. 74-818.

Appendix A

OPINION

Gentlemen:

Plaintiffs, Anna Ross and Joyce Norkett, challenge the procedures used by New Jersey unemployment compensation officials in processing "wage-benefit conflict" cases. Plaintiffs are two unemployment claimants who have been denied benefits. Defendant is Joseph A. Hoffman, Commisssioner of the Department of Labor and Industry. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343(3) and (4). The case is now before the Court on defendant's motion to dismiss the action as moot or, alternatively, for summary judgment. Also pending is plaintiffs' motion for an order permitting this action to be maintained as a class action. Fed. R. Civ. P. 23(c)(1).

A "wage-benefit conflict" arises when an unemployment claimant fraudulently collects unemployment benefits for periods when he actually was working and earning wages. The two named plaintiffs in the present case allege that they were denied benefits, without a hearing, for lengthy periods of time on the basis of suspected wage-benefit conflicts. While the lawsuit was pending, New Jersey officials agreed to institute, and ultimately adopted, new procedures for processing wage-benefit conflict cases (Administrative Instruction UIM-451).

Under the new procedures, persons whose claims for benefits are denied on the ground of wage-benefit conflicts are entitled to a hearing at which counsel may be present and witnesses may be called. UIM-451 also provides for advance written notice of the fraud charge and, in those cases where the determination is adverse to the claimant, a written statement containing the grounds

Appendix A

for the decision must be prepared. The state agreed to apply these new procedures to the present plaintiffs and to withdraw criminal fraud charges that were contemplated against the plaintiffs. In view of the foregoing, defendant urges that the present case is moot.

Plaintiffs, however, insist that the case is not moot because even the new procedures violate the "fair hearing"[1] and "payment when due"[2] provisions of the Social Security Act, as well as the due process and double jeopardy provisions of the Federal Constitution. Specifically, plaintiffs attack the new procedures on the grounds that: (1) inadequate advance notice of charges is provided; (2) the official presiding at the hearing often is a fraud investigator rather than an impartial examiner; (3) no effective right to confront witnesses is granted; (4) the state has an unwritten policy of suspending benefits for lengthy periods of time prior to the final eligibility determination by the hearing examiner; (5) the Department of Labor and Industry levies substantial fines or penalties without the ordinary protections of the criminal process; and (6) persons fined by the administrative agency still are subject to criminal prosecution for fraud.

If true, plaintiffs' allegations clearly would raise substantial questions concerning the statutory and constitutional validity of the state's new procedures. See *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144

---

[1] 42 U.S.C. §503(a)(3).

[2] 42 U.S.C. §503(a)(1).

(1963); *Pregent* v. *New Hampshire Dept. of Employment Security,* 361 F. Supp. 782 (D.N.H. 1973) (3-Judge Court), vacated and remanded for consideration of mootness, 94 S. Ct. 2595 (1974). We are unable to resolve these questions merely by analyzing the text of UIM-451. In these circumstances, we cannot find that UIM-451 has rendered plaintiffs' action moot.[3] Similarly, summary judgment is inappropriate because plaintiffs' contentions raise factual issues which are disputed by the parties. Fed. R. Civ. P. 56(c); see *Clyde* v. *Hodge,* 413 F. 2d 48, 51 (3d Cir. 1969).

Further, the Court declines, at this time, to decide the plaintiffs' motion for an order permitting this case to proceed as a class action. The first prerequisite to a class action is that the class be "so numerous that joinder of all members is impracticable". Fed. R. Civ. P. 23(a)(1). The burden of showing that joinder is impracticable is on the party instituting the class action. *Cash* v. *Swifton Land Corp.,* 434 F. 2d 569, 571 (6th Cir. 1970); *Tuma* v. *American Can Co.,* 367 F. Supp. 1178, 1188 (D.N.J. 1973). Here, plaintiffs apparently would seek to represent a class of persons whose claims for unemployment benefits have been denied pursuant to the UIM-451 procedure.[4] Plain-

[3] Plaintiffs, we suggest, should file an amended complaint reflecting the procedural changes that have occurred since the filing of the initial complaint and to which they are now subject pursuant to the state's agreement.

[4] In their moving papers, plaintiffs purport to represent *all* recipients of unemployment benefits, apparently on the theory that any recipient potentially is subject to the UIM-451 procedure. The Court cannot authorize such a broad class. Where all members of a proposed class have not suffered from the alleged illegal conduct, there can be no questions of law or fact common to the entire class, as required by Fed. R. Civ. P. 23(a)(2). *See* 7 Wright & Miller, *Federal Practice and Procedure,* §1763, at p. 609. Moreover, there would be no "case or controversy" as to those members of the class who had suffered no wrong.

tiffs have made no showing as to the size of this class. The class may, in fact, be quite limited in number because UIM-451 was not instituted until October 17th, 1974.

Since there is a distinct possibility that this case can be properly resolved on plaintiffs' statutory claims, this Court will not request the convening of a three-judge court. See *Hagans* v. *Lavine,* 415 U.S. 528, 543-45 (1974).

Accordingly, defendant's motion to dismiss or, alternatively, for summary judgment, is denied. Plaintiffs' motion for an order permitting this action to proceed as a class action is also denied, without prejudice. An appropriate order will be submitted.

Very truly yours,

GEORGE H. BARLOW
United States District Judge

GHB/ebj

APPENDIX B

Transcript of Argument on Motion to Amend Order of Dismissal

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 74-818

ANNA ROSS, JOYCE NORKETT, and CHARLES THOMAS, individually and on behalf of all other persons similarly situated,

Plaintiffs,

vs.

JOHN HORN, COMMISSIONER Division of Employment Security, Department of Labor and Industry of the State of New Jersey, WILLIAM J. KRISTJEN, MANAGER, Central Newark Unemployment Insurance Claims Office of the Division of Unemployment and Disability Insurance of the Department of Labor and Industry of the State of New Jersey, and JAMES A. WARE, ASSISTANT COMMISSIONER for Income Security of the Department of Labor and Industry of the State of New Jersey,

Defendants.

Trenton, New Jersey
July 17, 1978

Appendix B

Before The Honorable GEORGE H. BARLOW, USCJ

Appearances:

RICHARD S. SEMEL,
For the Plaintiffs

MICHAEL S. BOKAR,
Deputy Attorney General
For the Defendants

HEARING ON DEFENDANTS' MOTION TO AMEND CERTAIN ORDER OF DISMISSAL

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an accurate record as was stenographically in the above entitled proceedings.

HELEN C. JOHNSON
Court Reporter

Mr. Semel: The purpose of this motion initially was to request the Court to enter declaratory judgment embodying findings of fact and conclusions of law specifically to prevent the State from vitiating the effect of your opinion by either revoking the regulations which you found were now complied with the statute or vitiating them in some way by amendment.

Subsequently I have come across the case of *Parham* v. *Southwestern Telephone* cited in my supplemental brief which might provide the same remedy. That would be for the Court to retain jurisdiction of this case.

The Court: Forever?

Mr. Semel: That is an indication the Court did not answer in the *Parham* decision, but I would guess a period of another two years would be satisfactory.

The Court: I don't understand. You lack such confidence in the State of New Jersey. You think after—I didn't really tell them, as you recall, in this case the regulations were challenged in midstream, so I never fully addressed the original regulations. They were changed, as you know, I think specifically, as you suggest, by reason of the suit you brought, or at least that was a contributing factor until they passed statutory and constitutional muster, but I never addressed myself to the impropriety of the original regulation.

Are you concerned now, after finding that the current regulations are acceptable, the State government is now going to change and go back to the old regulation?

Mr. Semel: I am concerned about the possibility of further changes in the regulation, yes, the reason being, your Honor will recall that only one regulation was ever published in the New Jersey Register, and that was the original regulation which was promulgated, I believe, in September of 1974, immediately prior to the motion to dismiss the case on the grounds that it was moot. That regulation was not published until the following July, if I am not mistaken, and not in exactly the same form. That regulation has been changed a number of times, the latest time being the 27th of January, immediately preceding the trial of the case, and yet up to this date neither the changed regulations nor the subsequent amendments to the regulations have ever been published in the New Jersey Register, which means only people who are incidentally familiar with this arrangement and have access to Exhibit P-1, which was the book of regulations kept ordinarily in the local manager's office at the Unemployment local offices of employment, will have any way of determining those regulations exist or what their conditions are in six months from now or a year or two years from now.

I could, I suppose, go to the manager's office every few months and ask to look at the regulations.

You may recall also that the numbering system is virtually at random. No way to determine what regulation pertains to a particular subject. There is no index, and I think it is very possible that after—

The Court: Given all of that, what difference does it make whether I retain jurisdiction? If you determine that is a violation, file another lawsuit.

Mr. Semel: If I have another plaintiff. You recall the class in this case consisted of some 700-odd people or more, possibly as many as 2500 people, and yet we were never able to determine in any detail the identities of these people. And to require the outcome of an issue to depend on the fortuity of some individual walking into my office or some other legal services office or some other attorney's office who is knowledgeable in this area, it seems to me is, as a means of remedy, unnecessary.

The Court: Yes.

Anything further?

Mr. Semel: As far as the remainder of the case is concerned, I believe under the cases I have cited and under the statute, the plaintiffs are in fact the prevailing party. Therefore, they are entitled to costs, which I have set forth in my initial affidavit as being necessary.

The Court: How can you suggest that you were the prevailing party in this case? I agree I might concede starting a lawsuit might have impaneled the State of New Jersey to change regulations to avoid what may have been some imperfections in its original regulations. You

may have inspired those changes, but the judgment of the Court was directly contrary to your application, finding the government regulations, State regulations were valid.

Mr. Semel: The regulations as they existed as of the date of the trial in January and February of 1977, but not at the time the suit was started. At the time, if you recall, you found just the opposite.

The Court: That was on an application for a summary judgment.

Mr. Semel: Yes, based on the assertion that the UIM 451, which was the basic regulation and one basically still in effect, has changed the situation so drastically the suit should be dismissed. You found otherwise. Indeed, you found the regulation in existence originally did not apply to everybody who was entitled to a hearing under the wage benefit conflict statute or under the policy. It was only after the suit was started and after the State recalled all of these cases and after they expanded their regulations to give the benefits of the statute to everybody that you finally concluded at the end of the case that the State regulations as no exist provided the constitutional and statutory protections. And again I would like to remind your Honor it wasn't until January 27, which was less than ten days before the suit was started, the State promulgated regulations to tell its fraud investigators and the hearing officers that this regulation applied to them.

In the context of the suit, this suit was the catalyst which caused the amendment of the regulations. But for the institution of this suit, we would be back where we were in 1974, when Mrs. Ross had to wait from April 1973 until November 1974 after the regulations were promulgated to have a hearing, where Mrs. Norkett had

to wait the same period of time. Had it not been for the institution of that suit, those ladies might never have had a hearing, and Mr. Thomas, the other named plaintiff, didn't get a hearing at all, even though the regulations were in effect, and they did apply to him.

In the view of the courts and Congress in promulgating the attorney's civil rights act, attorney's fee act, this case, although you did enter an order dismissing the complaint, nevertheless I believe the plaintiff class was the prevailing party.

The Court: Do you wish to address yourself to this?

Mr. Bokar: My remarks will be very brief.

First of all, there is absolutely no evidence that the named plaintiffs did not have a hearing even under the old procedure. I call your Honor's attention to your Honor's opinion at page 4, where you note as early as March 1972 administrative instructions of the Department of Labor and Industry did require the holding of a hearing in wage benefit conflict cases. However, as the result of the institution of this lawsuit, the Attorney General's Office reviewed those early procedures and determined that they did indeed contain defects and substantial defects, one of which is that following the hearing required under the old procedure as early as March 1972, there were no required findings of fact and conclusions of law, in other words no determination was required to be issued following that hearing. And it was as the result of that review by the New Jersey State Attorney General's Office and the determination that defects such as those existed that changes were made. Of course, it is true, and we conceded it quite explicitly, that this litigation did result in very substantial changes being made. But the purposes of this motion, to say in fact there is no evidence at all that the Department of Labor and Industry of the Attor-

ney General's Office has any inclination at all to return to the old procedures, the fact is, your Honor, so long as I have a say in the matter, there will no reversion to the old procedures, and does the Court have the authority to issue declaratory and injunctive relief of the kind asked for by the plaintiff? Of course it does.

I suppose if there was evidence brought to the Court's attention that the State was planning to revert, the Court might entertain such a motion, but the fact is there is no such intention, no evidence of such intention.

On the attorenys' fees and costs, court costs, of course the governing decision now is the recent decision of the United States Supreme Court in *Hutto* v. *Finney,* 46 Law Week, 4817, a decision handed down June 3, 1978.

The Court of course there pointed to the fact that attorneys' fees may be awarded and court costs may be awarded against the State and State officials in favor of the prevailing party to litigation. The key words there are may and the discretion of the court and prevailing party.

Your Honor has already indicated, and of course we concur there is no indication at all from reading the Court's opinion that Mr. Semel represents the prevailing party. Beyond that the Supreme Court indicated in that case that it may be appropriate to award such fees and costs because where the State, following the issuance of an injunction against a State official or the State fails in bad faith to comply with the court's injunctive order, the Court indicated in that situation also it might be appropriate to award such costs and fees, but we have neither situation here, and for those reasons we submit the motion should be denied.

The Court: Yes, gentlemen.

I am satisfied, Mr. Semel, to begin with, in terms of retaining jurisdiction, it seems to me rather silly if every case I try in which a matter involving the State or indeed involving any other party is resolved against one party, you ask me to retain jurisdiction to be sure the regulations are not changed or some change does not occur, and that would defeat the success you have gained thus far.

While it is true, as I have indicated to you, that institution of your suit originally inspired, if that is the occasion, the Government to review its regulations and to redraft them in a manner that would not offend either the Constitution or the controlling statutory law, but it cannot be said you were the prevailing party in this case, because by the time we got to this case, as you well know, the regulations were changed, and indeed the regulations change from day to day. So that I addressed myself to the regulations as they existed at the time of trial and found them to be in full compliance with both statutory and constitutional provisions in question.

Under those circumstances, I have to deny your application. I certainly can't amend my order of dismissal expressing some dicta to the effect that the original state of the regulations was unconstitutional. It would be meaningless. And I didn't do it, of course, in the final judgment of this Court nor the opinion supporting the final judgment.

Accordingly, the application to amend the dismissal is denied. The application to retain jurisdiction is also denied and the application for costs and counsel fees is also denied.

Mr. Semel: Thank you, your Honor.